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LINCARE INC. and LINCARE PHARMACY SERVICES INC.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JENNIFER PROSTEK, an individual, on behalf of herself and on behalf of other persons similarly situated and aggrieved,

Plaintiff,

v.

LINCARE INC., a Delaware corporation; LINCARE PHARMACY SERVICES INC., a Delaware corporation; and DOES 1 through 50, inclusive,

Defendants.

CASE NO.

DEFENDANT LINCARE INC.'S NOTICE OF REMOVAL PURSUANT TO 28 U.S.C. §§ 1332, 1367(a), 1441(a), 1441(b), 1446 AND 1453

Complaint Filed: September 7, 2022
Removal Filed: November 28, 2022

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TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA:

PLEASE TAKE NOTICE that Defendant LINCARE INC. ("Lincare") hereby removes the above-entitled action from the Superior Court of the State of California, County of Tulare, to the United States District Court for the Eastern District of California pursuant to 28 U.S.C. §§ 1332(d) (Diversity under Class Action Fairness Act), 1367(a) (Supplemental Jurisdiction), 1441(a), 1441(b), 1446 and 1453, based on the following facts:

I. PLEADINGS AND PROCESS, AND ORDERS

1. On September 7, 2022, Plaintiff Jennifer Prostek ("Plaintiff"), individually, and on behalf of others similarly situated, filed a complaint against Defendants Lincare Inc. and Lincare Pharmacy Services Inc. (collectively, "Defendants"), entitled "*JENNIFER PROSTEK, an individual, on behalf of herself and on behalf of other persons similarly situated and aggrieved, v. LINCARE INC., a Delaware corporation; LINCARE PHARMACY SERVICES INC., a Delaware corporation; and DOES 1 through 50, inclusive,*" in the Superior Court of California, County of Tulare, Case No. VCU293223 (hereinafter, the "Complaint"). A true and correct copy of the Complaint is attached to the Declaration of Min K. Kim, ¶ 2 ("Kim Decl.") as **Exhibit A**. The allegations in the Complaint are incorporated for reference in this notice of removal but are not admitted.

2. The Complaint alleges 10 causes of action which Plaintiff pursues on a class-wide basis: (1) failure to provide required meal periods; (2) failure to provide required rest periods; (3) failure to pay overtime wages; (4) failure to pay minimum wages; (5) failure to pay all wages due to discharged and quitting employees; (6) failure to maintain required records; (7) failure to furnish accurate itemized wage statements; (8) failure to indemnify employees for necessary expenditures incurred in discharge of duties; (9) unfair and unlawful business practices; and (10) penalties under the Labor Code Private Attorneys General Act. (*See generally* Ex. A. *supra*.)

3. True and correct copies of the Summons, Civil Case Cover Sheet ("CCCS"), and Alternate Dispute Resolution Package ("ADR") are attached to the Kim Decl. as **Exhibit B**.

4. True and correct copies of Proofs of Service of Summons, Complaint, CCCS and

ADR are attached to the Kim Decl. as **Exhibit C**.

5. Pursuant to 28 U.S.C. § 1446(d), the foregoing exhibits constitute all process, pleadings and orders received by Defendants or filed with the Court in this action. To Defendants' knowledge, no further process, pleadings, or orders related to this case have been filed in Superior Court of California, County of Tulare. (Kim Decl., ¶ 5.)

II. TIMELINESS OF REMOVAL

6. This Notice of Removal is timely filed in accordance with 28 U.S.C. § 1446(b), in that it is filed within thirty (30) days after October 28, 2022, date on which Defendants were served with the Complaint. *See Murphy Bros., Inc. v. Mitchetti Pipe Stringing, Inc.*, 526 U.S. 344, 354 (1999). The 30-day period for removal runs from the date of service of the summons and complaint, as governed by state law. *See id.* Here, the last day for removal falls on November 28, 2022, accounting for weekends and holidays. *See* 28 U.S.C. § 1446(b); Fed. R. Civ. Proc. 6(a); *Krug v. Wells Fargo Bank, N.A.*, No. C 11-5190, 2011 WL 6182341, *1 (N.D. Cal. Dec. 13, 2011). Accordingly, this Notice of Removal has been timely filed within the time provided by 28 U.S.C. § 1446(b).

III. VENUE

7. The United States District Court for the Eastern District of California is the proper venue for removal pursuant to 28 U.S.C. § 1441(a) because the action is pending in the Superior Court of the State of California for the County of Tulare, which is located within the Eastern District of California. 28 U.S.C. § 84(b).

IV. INTRADISTRICT ASSIGNMENT

8. Pursuant to E.D. Cal. L.R. 120(d), this action should be "commenced in the United States District Court sitting in Fresno, California, and in Bakersfield, California, Yosemite National Park or other designated places within those counties" because the action arises in Tulare County.

V. JURISDICTION PURSUANT TO THE CLASS ACTION FAIRNESS ACT

9. This Court has original jurisdiction over this case pursuant to the Class Action Fairness Act of 2005 ("CAFA"). 28 U.S.C. § 1332(d). CAFA provides the federal district courts

with original jurisdiction over civil class action lawsuits filed under federal or state law in which any member of a class of plaintiffs is a citizen of a state different from any defendant, and where the amount in controversy exceeds $5 million exclusive of interest and costs. 28 U.S.C. § 1332(d)(2).

10. Here, removal is proper under CAFA because, as set forth below, the case is filed as a civil class action, the amount in controversy allegedly exceeds $5 million exclusive of interest and costs, and at least one member (if not all) of the class of plaintiffs is a citizen of a state different from Defendants. The exceptions set forth in 28 U.S.C. § 1332(d)(3)-(5) are not applicable here.

11. This action was initially brought on behalf of "all current and former non-exempt employees of DEFENDANTS in the State of California at any time within the period beginning four (4) years prior to the filing of this action and ending at the time this action settles or proceeds to final judgment." (Compl., ¶ 5, Ex. A to Kim Decl., ¶ 2.) The size of the class is unknown to Plaintiff. However, Plaintiff claims that the potential class is a significant number such that joinder of all current and former employees individually would be impractical. (*Id.*, at ¶ 20.)

A. Citizenship of Parties

12. Pursuant to 28 U.S.C. § 1453(b), "A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants." CAFA's diversity requirement is satisfied when any member of a class of citizens is a citizen of a State different from any defendant. 28 U.S.C. § 1332(d)(2).

13. For diversity purposes, a person is a "citizen" of the state in which he or she is domiciled. *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088 (9th Cir. 1983). A person's domicile is the place he or she resides with the intention to remain, or to which he or she intends to return. *Kanter v. Warner-Labert Co.*, 265 F.3d 853, 857 (9th Cir. 2001).

14. Here, Plaintiff alleges that she "is a citizen and resident of the State of California."

(Compl., ¶ 7, Ex. A to Kim Decl.) Accordingly, Plaintiff is a citizen of the State of California for diversity purposes. *Kanter*, 265 F.3d at 857.

15. For purposes of CAFA, "a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business." 28 U.S.C. § 1332(c)(1); *see also, Johnson v. Columbia Prop. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006).

16. Defendant Lincare Inc. is a corporation that is incorporated in and exists under the laws of the State of Delaware, with its principal place of business in the State of Florida. Accordingly, Defendant Lincare Inc. is a citizen of Florida and Delaware for purposes of diversity jurisdiction. 28 U.S.C. § 1332(c)(1).

17. Defendant Lincare Pharmacy Services Inc. is a corporation that is incorporated in and exists under the laws of the State of Delaware, with its principal place of business in the State of Florida. Accordingly, Defendant Lincare Pharmacy Services Inc. is a citizen of Florida and Delaware for purposes of diversity jurisdiction. 28 U.S.C. § 1332(c)(1).

18. The presence of Doe defendants in this case has no bearing on diversity with respect to removal. *See* 28 U.S.C. § 1441(a) ("[f]or purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded").

19. Here, diversity of citizenship is met because Plaintiff is a citizen of California while Defendants are citizens of Florida and Delaware. Therefore, the minimal diversity requirement is fully satisfied. *See*, 28 U.S.C. § 1332(d)(2)(A).

B. The Amount in Controversy Exceeds $5 Million and Plaintiff's Classes are More than 100 Class Members

20. CAFA requires the "matter in controversy" to exceed "the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(2). "The claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds" this amount. 28 U.S.C. § 1332(d)(6). Further, CAFA may only be invoked if the proposed class contains at least 100 members. 28 U.S.C. § 1332(d).

21. "In determining the amount in controversy, courts first look to the complaint.

Generally, 'the sum claimed by the plaintiff controls if the claim is apparently made in good faith.'" *Ibarra v. Manheim Investments, Inc.* (9th Cir. 2015) 775 F.3d 1193, 1197 (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938)). "Whether damages are unstated in a complaint, or, in the defendant's view are understated, the defendant seeking removal bears the burden to show by a preponderance of the evidence that the aggregate amount in controversy exceeds $5 million when federal jurisdiction is challenged." *Ibid.*

22. Plaintiff has not alleged a specific amount in controversy in her Complaint. A "defendants' notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." *Dart Cherokee Basin Operating Co., LLC v. Owens*¸ 574 U.S. 81, 89 (2014). If the plaintiff or the court contests a defendant's allegations, however, "[e]vidence establishing the amount is required." (*Id.*) As noted in *Dart Cherokee*: "'[D]efendants do not need to prove to a legal certainty that the amount in controversy requirement has been met. Rather, defendants may simply allege or assert that the jurisdictional threshold has been met. Discovery may be taken with regard to that question. In case of a dispute, the district court must make findings of jurisdictional fact to which the preponderance standard applies.'" *Id.* (quoting House Judiciary Committee Report on the Federal Courts Jurisdiction and Venue Clarification Act of 2011, H.R. Rep. No. 112-10, p. 16 (2011). *See also Arias v. Residence Inn*, 936 F.3d 920, 922 (9th Cir. 2019) ("a removing defendant's notice of removal 'need not contain evidentiary submissions' but only plausible allegations of the jurisdictional elements") (quoting *Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015)).

23. Here, Lincare can plausibly allege, based on Plaintiff's Complaint and her prayer for relief, that the amount in controversy for Plaintiff's class-wide claims exceeds $5 million. The assertions of Lincare herein are limited to their preliminary understanding of Plaintiff's claims and data currently available to Lincare.

24. Plaintiff has defined the proposed Class as "all current and former non-exempt employees of DEFENDANTS in the State of California at any time within the period beginning four (4) years prior to the filing of this action and ending at the time this action settles or proceeds

to final judgment." (Compl., ¶ 5, Ex. A to Kim Decl., ¶ 2.) (the "Proposed Class Members"). During the period of September 7, 2018 to November 28, 2022 (the date of removal) (hereinafter, the "Relevant Time Period"), based on the personnel and payroll records of those whom Lincare employed as hourly non-exempt employees during the Relevant Time Period, Lincare employed at least 629 individuals in California as hourly, non-exempt employees. The employees in question were employed full-time, and worked eight hours a day for 5 days a week. Accordingly, based on the employees' shift lengths and workweek schedules, it is reasonable to assume that all 629 employees in question are members of the Proposed Class Members. Based on the Proposed Class Members' personnel and payroll records, the average hourly rate of the Proposed Class Members is $19.83 per hour. As of the date of the removal, the Proposed Class Members worked approximately 40,086 workweeks in the Relevant Time Period.

25. While Lincare denies Plaintiff's claims of wrongdoing and denies her request for relief thereon, the facial allegations in Plaintiff's Complaint and the total amount of wages, penalties and attorneys' fees at issue in this action, when viewed in the light most favorable to Plaintiff, is in excess of the jurisdictional minimum. *Luckett v. Delta Airlines, Inc.*, 171 F.3d 295, 298 (5th Cir. 1999). "In measuring the amount in controversy, a court must assume that the allegations of the complaint are true and that a jury will return a verdict for the plaintiff on all claims made in the complaint." *Kenneth Rothschild Trust v. Morgan Stanley Dean Witter*, 199 F. Supp. 2d 993, 1001 (C.D. Cal. 2002). "When a '[d]efendant's calculations (are) relatively conservative, made in good faith, and based on evidence whenever possible,' the court may find that the '[d]efendant has established by a preponderance of the evidence that the amount in controversy is met.'" *Cagle v. C&S Wholesale Grocers, Inc.*, __ F.R.D. ___, 2014 WL 651923, *7 (E.D. Cal. Feb. 19, 2014) (quoting *Behrazfar v. Unisys Corp.*, 687 F. Supp. 2d 1199, 1204-05 (E.D. Cal. 2008) (citations omitted)). Nor does Lincare need to provide summary judgment-type evidence. *Cagle*, 2014 WL 651923, *7.

26. Where a plaintiff alleges that a defendant "adopted and maintained uniform policies, practices and procedures that caused the purported violations of California's [break laws] … [i]t is not unreasonable to assume that when a company has unlawful policies and they are

uniformly 'adopted and maintained,' then the company may potentially violate the law in each and every situation where those policies are applied." *Mejia v. DHL Express (USA), Inc.*, No. CV 15-890-GHK JCx, 2015 WL 2452755, *4 (C.D. Cal. May 21, 2015) (emphasis added). In that instance, the district court found that "a 100% violation rate is not an unreasonable assumption to use in estimating the amount in controversy in light of the allegations in the complaint." *Id.*

27. Here, Plaintiff alleges 10 causes of action: (1) failure to provide required meal periods; (2) failure to provide required rest periods; (3) failure to pay overtime wages; (4) failure to pay minimum wages; (5) failure to pay all wages due to discharged and quitting employees; (6) failure to maintain required records; (7) failure to furnish accurate itemized wage statements; (8) failure to indemnify employees for necessary expenditures incurred in discharge of duties; (9) unfair and unlawful business practices; and (10) penalties under the Labor Code Private Attorneys General Act, as representative actions. (*See generally* Ex. A. *supra*.)

28. Plaintiff seeks unpaid wages, unpaid premium compensation, interest, penalties, as well as attorneys' fees and costs. Plaintiff seeks recovery of the aforementioned remedies for all members of the Proposed Class. (*See, e.g., id.* at Prayer for Relief, ¶¶ 1-13.)

Failure to Provide Meal Periods Claim

29. As for her First Cause of Action, Plaintiff alleges that "PLAINTIFF and other similarly situated and aggrieved employees were given short meal breaks, provided meal breaks late (after the fifth hour of work for the first meal period and/or after the tenth hour of work for the second meal period), had their meal breaks interrupted, and/or were denied their meal breaks entirely." (Compl., at ¶ 14, Ex. A to Kim Decl., ¶ 2.) Plaintiff further alleges that "as part of DEFENDANTS' illegal policies and practices to deprive their current and former non-exempt employees all wages earned and due, DEFENDANTS required, suffered or permitted PLAINTIFF and CLASS MEMBERS to take less than the 30-minute meal period, or to work through them, and have failed to other provide the required meal periods to PLAINTIFF and CLASS MEMBERS under Labor Code § 226.7 and 512, and IWC Wage Order No. 5-2001, § 11 (*Id.*, at ¶ 22.)

30. Based on her allegations, Plaintiff alleges that the Proposed Class Members were

prevented from taking any lawful meal breaks for each shift they worked because of Lincare's illegal policies and practices. This type of allegation permits a reasonable assumption of a 100 percent violation rate, or 5 hours of pay per week for 5 days of missed meal breaks. However, using a conservative assumption that the Proposed Class Members were not provided with two meal breaks per workweek (two out of five meal periods were missed, short, or late per week), then based on the Proposed Class' average rate of pay ($19.83/hour) and their respective number of workweeks (40,086 workweeks), the meal break violation claim alleges at least **$1,589,810.76** ($19.83/hour x 2 hour x 40,086 workweeks) in damages.[1]

Failure to Provide Rest Periods Claim

31. As for her Second Cause of Action, Plaintiff alleges that "DEFENDANTS consistently failed to authorize and permit PLAINTIFF and other similarly situated and aggrieved employees off-duty rest breaks, including failing to authorize and permit PLAINTIFF and other similarly situated aggrieved employees to take rest breaks in the middle of each work period insofar as practicable." (Compl., at ¶ 15, Ex. A to Kim Decl., ¶ 2.) Plaintiff further alleges that "as part of DEFENDANTS' illegal policies and practices to deprive their current and former non-exempt employees all wages earned and due, DEFENDANTS failed to provide rest periods to PLAINTIFF and CLASS MEMBERS as required under Labor Code § 226.7 and 512, and IWC Wage Order No. 5-2001, § 12." (*Id.*, at ¶ 27.)

32. Based on her allegations, Plaintiff is claiming that the Proposed Class Members were prevented from taking any lawful rest breaks for each shift they worked because of Lincare's illegal policies and practices. This type of allegation permits a reasonable assumption of a 100 percent violation rate. However, using a conservative assumption that the Proposed Class Members were not provided with two rest breaks per workweek **(merely a 20 percent violation rate (two rest periods taken out of 10 rest periods owed per week))**, based on the Proposed Class members' average rate of pay ($19.83/hour) and their respective number of workweeks (40,086 workweeks), the rest break violation claim alleges at least **$1,589,810.76** ($19.83/hour x

[1] The meal break calculation is also reasonable as it is only accounting for the alleged violation of the first meal break, not the second meal break.

2 hour x 40,086 workweeks) in damages.

Failure to Pay Minimum Wage

33. As for the Fourth Cause of Action, Plaintiff alleges that "DEFENDANTS failed to pay PLAINTIFF and CLASS MEMBERS the applicable minimum wages for all hours worked in a payroll period by, among other things: requiring, suffering or permitting PLAINTIFF and CLASS MEMBERS to work off the clock; requiring, suffering or permitting PLAINTIFF and CLASS MEMBERS to work through meal and rest breaks; illegally and inaccurately recording time in which PLAINTIFF and CLASS MEMBERS worked…." (Complaint, ¶ 37.) Further, Plaintiff alleges that "DEFENDANTS, and each of them, acted pursuant to, and in furtherance of, their policies and practices of not paying PLAINTIFF and other CLASS MEMBERS all wages earned and due, through methods and schemes which include, but are not limited to, failing to pay overtime premiums…requiring, permitting or suffering the employees work off the clock, in violation of the California Labor Code and the applicable Welfare Commission ("IWC") Orders." (Complaint, ¶ 10.) These allegations of unpaid wages due to "policies, practices, and procedures" warrant an assumption of at least 30 minutes of unpaid wages per week. *See Andrade v. Beacon Sales Acquisition, Inc.*, Case No. CV 19-6963-CJC(RAOx), 2019 WL 4855997, at *3 (C.D. Cal. Oct. 1, 2019) ("violation rate of one hour off-the-clock work and two hours of uncompensated overtime per workweek was reasonable based on allegation of 'policy and/or practice'").

34. Based on the applicable minimum wage and the accompanying liquidated damages, if Proposed Class Members worked off the clock only 30 minutes per week, the amount in controversy for this claim is **$521,118** ((40,086 workweeks x $13 per hour) x 30 minutes x 2 for liquidated damages).

Failure to Timely Pay All Wages Due to Discharged and Quitting Employees

35. As for the Fifth Cause of Action, Plaintiff claims that "[d]uring the CLASS PERIOD, DEFENDANTS have willfully failed to pay accrued wages and other compensation to PLAINTIFF and CLASS MEMBERS in accordance with California Labor Code §§ 201 and 202." (*Id.*, ¶ 15.) Plaintiff further alleges that "[a]s a result, PLAINTIFF and CLASS MEMBERS are entitled to all available statutory penalties, including the waiting time penalties provided in

California Labor Code § 203, together with interest thereon, as well as other available remedies." (*Id.* at ¶ 44.)

36. Given the three-year statute of limitations for claims under section 203, at least 272 class members were terminated after September 7, 2019. The average daily shift for these employees was eight hours in length. Assuming *arguendo* the truth of Plaintiff's allegations that these employees are entitled to waiting time penalties, the amount in controversy is estimated to be at least **$1,294,502.40** (272 terminations x $19.83/hour x 8 hours x 30 days).

Failure to Furnish Accurate Itemized Wage Statements Claim

37. For the Seventh Cause of Action, Plaintiff alleges that "[d]uring the CLASS PERIOD, DEFENDANTS routinely failed and continue to fail to provide PLAINTIFF and CLASS MEMBERS with timely and accurate itemized wage statements in writing showing each employee's gross wages earned, total hours worked, the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, all deductions made, net wages earned, the inclusive dates of the period for which the employee is paid, the name of the employee and only the last four digits of his or her social security number or employee identification number, the name and address of the legal entity or entities employing PLAINTIFF and CLASS MEMBERS, and all applicable hourly rates in effect during each pay period and the corresponding number of hours worked at each hourly rate, in violation of California Labor Code § 226(a) and IWC Wage Order No. 5-2001, § 7." (*Id.*, at ¶ 50.) Plaintiff further alleges that "DEFENDANTS knowingly and intentionally failed to provide PLAINTIFF and CLASS MEMBERS with timely and accurate itemized wage statements in accordance with Labor Code § 226(a). (*Id.*, at ¶ 51.)

38. "An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000)." Cal. Labor Code ¶ 226(e)(1).

39. Proposed Class Members received one wage statement every two weeks. Given

the one-year statute of limitations for this claim, if every Proposed Class Member that worked after September 7, 2021, is awarded $50 for the first pay period he or she worked, and $100 for every pay period thereafter, then this claim puts **$557,250.00** at stake.

40. The amount in controversy for *only* Plaintiff's first (meal break violation claim), second (rest break violation claim), fourth (minimum wage claim), fifth (waiting time penalties) and seventh (wage statement claim) causes of action is estimated to be at least **$5,552,491.92**, exclusive of attorneys' fees and interest.

41. Plaintiff also seeks an award of reasonable attorneys' fees and costs for the Proposed Class Members pursuant to the California Labor Code §§ 1194, 2699, 2802, and California Code of Civil Procedure § 1021.5. (*See* Prayer for Relief, Ex. A to Kim Decl.) "[A] court must include future attorneys' fees recoverable by statute or contract when assessing whether the amount-in-controversy requirement is met." *Fritsch v. Swift Transp. Co.*, 899 F.3d 785, 794 (9th Cir. 2018). "[I]f the law entitles the plaintiff to future attorneys' fees if the action succeeds, 'then there is no question that future [attorneys' fees] are 'at stake' in the litigation,' and the defendant may attempt to prove that future attorneys' fees should be included in the amount in controversy." *Id.*

42. Although *Fritsch* has rejected an automatic assumption that a 25 percent fee recovery will be awarded in a wage and hour class action, the *Fritsch* court still permits use of a "percentage based method" "when estimating the amount of attorneys' fees included in the amount in controversy." *Id.*, at 796, n.6. District courts have recognized this important caveat in *Fritsch*. *See Cortez v. United Natural Foods, Inc.*, 2019 U.S. Dist. LEXIS 31540, *22-23 (N.D. Cal. Feb. 27, 2019) ("while the Ninth Circuit refused to hold that a court must always use the 25% rate of the final award to determine future attorneys' fees, the Court did 'not hold that a percentage-based method is never relevant when estimating the amount of attorneys' fees included in the amount in controversy.'").

43. The rule now is merely that a removing defendant cannot assume that such a percentage will be awarded. As a result, several district courts, after *Fritsch*, have held that where nothing about a wage and hour class action suggests that there would be a downward departure

from the 25 percent benchmark, such a percentage is appropriate. *See Cortez*, 2019 U.S. Dist. LEXIS 31540, *23 (N.D. Cal. Feb. 27, 2019) (relying on *Fritsch*, holding that "[i]n the Court's experience, this appears to be a typical wage and hour class action to which courts in this Circuit would likely apply the 25% benchmark rate."); *Kastler v. Oh My Green, Inc.*, 2019 U.S. Dist. LEXIS 185484, *18 (N.D. Cal. Oct. 25, 2019) (following *Fritsch*, and holding that "[a]lthough Defendant provide[d] very little to support a 25% fee calculation," the court, relying "on its own knowledge of customary rates and [its] experience concerning reasonable and proper fees," found that it was reasonable); *Ramirez v. Benihana Nat'l Corp.*, 2019 U.S. Dist. LEXIS 3537, *6 (N.D. Cal. Jan. 8, 2019) ("While the Court acknowledges the 25% benchmark does not automatically apply in all cases, see *Fritsch*, 899 F.3d at 796…none of the factors counseling against the application of the 25% benchmark have been raised by plaintiffs, nor does the record before the Court otherwise reflect a departure from such benchmark is warranted.").

44. Therefore, because nothing about this wage and hour class action suggests that a downward departure is warranted, this Court should consider attorneys' fees to be 25 percent of the fund. Considering the sum of the potential damages for only the first, second, fourth, fifth, and seventh causes of action are estimated to be at least $5,552,491.92, it is reasonable to assume *arguendo* that the potential attorneys' fees would be $1,388,122.98 ($5,552,491.92 x 25%) for these five causes of action. This calculation would put a total of **$6,940,614.90** in controversy ($5,552,491.92 + $1,388,122.98 = $6,940,614.90).

45. Accordingly, the amount of attorneys' fees at stake in this case add even more to the amount in controversy.

46. Finally, CAFA's numerosity requirement of the proposed class having at least 100 class members is satisfied by the 629 Proposed Class Members identified herein above. *See* 28 U.S.C. § 1332(d)(5)(B).

VI. DEFENDANT LINCARE PHARMACY SERVICES INC. HAS CONSENTED TO THE REMOVAL

47. All defendants who have been properly joined and served must join in or consent to the removal of a civil action over which the district courts have original jurisdiction. 28 U.S.C.

§ 1446. Defendant Lincare Pharmacy Services Inc. has consented to the removal of the action.

VII. NOTICE OF REMOVAL

48. A copy of this notice of removal will be filed with the Clerk of the Superior Court of the State of California, County of Tulare.

49. By removing the action to this Court, Defendants do not waive any defenses, objections, or motions available to them under state or federal law. Defendants expressly reserve the right to require that the claims of Plaintiff and/or all members of the putative class be decided on an individual basis.

50. WHEREFORE, Defendants pray that the Court remove this civil action from the Superior Court of the State of California, County of Tulare, to the United States District Court for the Eastern District of California.

Respectfully submitted,

Date: November 28, 2022

FORD & HARRISON LLP

By: */s/ Min K. Kim*
David L. Cheng
Min K. Kim
Attorneys for Defendants,
LINCARE INC. and LINCARE PHARMACY SERVICES INC.

PROOF OF SERVICE

I, Lillian Marquez, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 350 South Grand Avenue, Suite 2300, Los Angeles, California 90071.

On **November 28, 2022**, I served a copy of the following document(s) described below on the interested parties in this action, as follows:

DEFENDANT LINCARE INC.'S NOTICE OF REMOVAL PURSUANT TO 28 U.S.C. §§ 1332, 1367(a), 1441(a), 1441(b), 1446 AND 1453

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Attorneys for Plaintiff, JENNIFER PROSTEK

☒ **BY U.S. MAIL:** By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth above. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **ELECTRONICALLY:** I caused a true and correct copy thereof to be electronically filed using the Court's Electronic Court Filing ("ECF") System and service was completed by electronic means by transmittal of a Notice of Electronic Filing on the registered participants of the ECF System.

☒ **FEDERAL:** I declare that I am employed in the office of a member of the State Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America and State of California that the above is true and correct.

Executed on **November 28, 2022**, at Los Angeles, California.

Lillian Marquez